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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MELISSA B.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN  
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Real Party in Interest.

D040462

(San Diego County  
Super. Ct. No. J510483A-C)

PROCEEDINGS seeking extraordinary relief after reference to a Welfare and Institutions Code section 366.26 hearing (all statutory references are to the Welfare and Institutions Code). Gary M. Bubis, Juvenile Court Referee. Petition denied.

Melissa B. is the mother of four daughters by three different men. The girls were declared dependents in May 2001 based on Melissa's abuse of methamphetamine and alcohol and the violence in her home. After 16 months of services, the court determined there was not a substantial probability the three eldest girls would be returned to Melissa's physical custody by the 18-month review date and terminated Melissa's services.<sup>1</sup>

Melissa petitions for writ relief of the order referring the matter to a section 366.26 hearing (§ 366.26, subd. (I); Cal. Rules of Court, rule 39.1B), claiming the court abused its discretion in terminating services because there was a substantial probability that her three eldest daughters would be returned to her by October 3, 2002. We issued an order to show cause, county counsel and minors' counsel responded, and the parties waived oral argument. We review the petition on the merits and deny it.

#### FACTUAL AND PROCEDURAL BACKGROUND

Melissa's daughters are Katie B. (born in 1988), Kelli K. (born in 1989), Kristina K. (born in 1991) and Rachel S. (born in 1994). Between 1988 and 2000, Melissa had 25 referrals for child emotional, physical and sexual abuse and neglect. This is the girls' second dependency proceeding. They were dependents from 1994 to 1997 because they had been exposed to violent confrontations between Melissa and Rachel's father, David S. David also physically abused Katie.

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<sup>1</sup> The court continued services for the youngest daughter. She is within the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) and is not a subject of this petition. The girls' respective fathers did not reunify and do not petition.

On March 27, 2001, Melissa told a social worker that her current husband, Dale C., had recently been released from jail and was using methamphetamine. Melissa said Dale beat and choked her, knocked out one of her teeth and called the girls names. Melissa admitted she was using methamphetamine and abusing alcohol. She revealed that she gives the girls Clonidine, a prescription antihypertensive, to tranquilize them. The girls were taken into protective custody on April 3, 2001.

Social worker Cathy Reed reported the girls were frequently absent from school and had chronic head lice. Kelli and Kristina are educationally challenged. The girls confirmed there was violence in the home and their mother had been giving them Clonidine for a long time.

The family physician stated Katie and Kelli have serious behavioral problems. Kelli was diagnosed with ADHD, and Katie suffers from depression. Both were prescribed Clonidine. The physician thought it bordered on abuse to give Rachel and Kristina tranquilizers, and he feared Melissa might harm her daughters out of ignorance.

The San Diego County Health and Human Services Agency (HHSA) petitioned to declare the girls dependents based on Melissa's substance abuse and violence with Dale. The petition for Kristina also alleged she was at substantial risk of harm because her mother was improperly medicating her. The court detained the girls with their maternal grandmother and ordered Melissa to enroll in the Substance Abuse Recovery Management Systems (SARMS). Three days later Melissa delivered a stillborn baby, unaware that she was pregnant.

The social worker reported Katie and Kelli were taken off Clonidine because physicians determined the girls did not need the medication. The girls were doing well living with their grandparents and were happy to have clean school clothes and clean bedding. The girls became upset by Melissa's telephone calls because she was inappropriate and discussed the dependency case. Melissa coached Katie not to testify that she had offered Katie as a sexual partner.

HHSA initially recommended against reunifying Melissa with her daughters based on Melissa's continued drug use and failure to benefit from previous services. On May 7, HHSA changed the recommendation to reunification. The court declared the girls dependents on May 8. On May 29 the court placed the girls with their maternal grandparents and ordered Melissa to report to SARMS within 48 hours. Melissa's case plan required her to participate in domestic violence and parenting programs, substance abuse treatment, counseling, a psychological evaluation and supervised visitation.

#### *Six-Month Review Hearing*

For the six-month review hearing in November, the social worker reported Melissa did not begin SARMS until September when she entered the St. Vincent de Paul shelter. David was also at the shelter. Psychologist Alan Flitton evaluated Melissa in October and reported she "has a tendency to subject herself to physical abuse and self-destructive behaviors in order to stay with a mate." Dr. Flitton thought Melissa's judgment and parenting abilities were "sorely lacking." He considered her a risk to herself and her children and strongly discouraged reunification. Dr. Flitton stated Melissa's "psychological and emotional functioning is volatile and would be compromised should

her children be returned to her." If Melissa became involved in another intimate relationship, Dr. Flitton predicted the children would be at risk for continued family violence and personal abuse. He recommended only supervised visits in a controlled environment. The court found Melissa had made some progress with her case plan and continued services.

In March 2002 Melissa requested unsupervised visits with her daughters. At that date Melissa had been sober for six months. Melissa's substance abuse counselor favored unsupervised visits. Melissa's therapist had no recommendation. Each of the girls' therapists opposed unsupervised visits, and the girls requested supervision. On March 12, the court denied Melissa's request and ordered family therapy.

#### *July 10 and 15 Twelve-Month Review Hearings*

Social worker Timothy Peck reported Melissa had taken 84 hours of parenting classes and had participated in domestic violence classes for three months. Melissa was in compliance with SARMS and participated in aftercare, a 12-step program, dual-diagnosis classes, and an anger management class. She took psychotropic medication for depression. Melissa resided in a sober living apartment paid for by David. She had made some progress in therapy but her therapist was concerned with her emotional instability.

Katie told Peck that she was willing to consider reunifying with her mother at some point in the future if Melissa continued to do well in her programs. Kelli did not want to live with her mother for at least two years. Both Katie and Kelli wanted nothing to do with David. Kristina wanted to stay with her grandparents. She requested visits continue to be supervised, stating her mother was unable to parent the girls together.

HHSA was unsuccessful in coordinating conjoint counseling. Peck recommended continuing services to the 18-month review to "benefit/strengthen the relationship between mother and Katie, Kelli and Kristina whether [they] are able to reunite with her or not."

Peck testified Melissa made significant progress with her service plan. Melissa visited her daughters on Saturdays for two hours, supervised by HHSA. She telephoned them once a week. Peck thought Melissa demonstrated the capacity to protect her daughters. He did not recommend returning the girls to Melissa because she had "issues" that need to be addressed and the girls did not want to return to her. Peck thought that there was no substantial probability that the girls would be returned to Melissa by the 18-month date. He thought conjoint therapy would be appropriate, although Kristina's therapist indicated Kristina should not participate. Kelli and Katie were willing to try conjoint therapy; however, they were adamant that the dependency case be closed. They requested guardianship.

Peck did not believe the girls could safely be returned to Melissa at that point in time. He was concerned about Melissa's emotional stability and did not think it would be resolved by the 18-month review.

Peck thought Melissa should have a job to become self-sufficient. She was still involved with David, who had not addressed his domestic violence. Peck said it was "important for [Melissa] to provide for herself without relying on men who are not safe for her or her children." Peck thought Melissa was still within the domestic violence

"framework" because she relied upon funding from a man with whom she had abused drugs and engaged in violence.

Kelli, called by Melissa's counsel, testified she is 12 years old and in eighth grade. Kelli said she felt "good" about possible conjoint therapy but she "really want[s] to close up the case." She was tired of talking to people and the dependency proceeding interfered with her school, friends and sisters. Kelli stated she does not want to live with her mother "anytime soon" because she wants to make sure her mother will "follow through." Kelli said "we got taken away before" and then her mother "got with Dale, Dale's the other guy that used to hit us. He used to hit us like David." The court called a recess because Kelli was "not doing well."

Minors' counsel moved under section 350, subdivision (c)<sup>2</sup> for a finding that the HHSA did not meet its burden of proof to show there was a substantial probability the girls would be returned to Melissa by the 18-month review hearing. Counsel for HHSA and Melissa opposed the motion. The court granted the motion, commenting "one of the most telling things in this trial was that Kelli broke down crying within five minutes of

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<sup>2</sup> Section 350, subdivision (c) provides: "At any hearing in which the probation department bears the burden of proof, after the presentation of evidence on behalf of the probation department and the minor has been closed, the court, on motion of the minor, parent, or guardian, or on its own motion, shall order whatever action the law requires of it if the court, upon weighing all of the evidence then before it, finds that the burden of proof has not been met. That action includes, but is not limited to, the dismissal of the petition and release of the minor at a jurisdictional hearing, the return of the minor at an out-of-home review held prior to the permanency planning hearing, or the termination of jurisdiction at an in-home review. If the motion is not granted, the parent or guardian may offer evidence without first having reserved that right."

testifying because she couldn't deal with something that happened in the past." The court noted it was "speculative at best" that the girls would be able to be returned by the 18-month date, and Melissa's relationship with David was not "addressed or resolved." It based its ruling on "the age of the children, the wishes of the children, [and] the history of the case." The court emphasized the children were dependents in 1997 and they are "very resistant [and] distrustful of their mother."

## DISCUSSION

When a dependent child is not returned to parental custody at the 12-month review hearing, the court must set a selection and implementation hearing, order long-term foster care or continue reunification efforts to the 18-month date. (§ 366.21, subd. (g).)

". . . The court shall continue the case only if it finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent . . . and safely maintained in the home within the extended period of time or that reasonable services have not been provided to the parent . . . ." (§ 366.21, subd. (g)(1).)

In order to find a substantial probability of return, the court is required to find the parent has consistently visited the child (§ 366.21, subd. (g)(1)(A)); the parent has made substantial progress in resolving the problems that lead to removing the child (§ 366.21, subd. (g)(1)(B)); and "[t]he parent . . . has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs." (§ 366.21, subd. (g)(1)(C).)

Here the court concluded Melissa did not meet the last criterion. Melissa claims the court abused its discretion because social worker Peck testified he believed she would be able to provide for the girls' safety and protect them. She argues conjoint therapy could have addressed the girls' concerns by the 18-month date.

HHSA agrees the court abused its discretion, claiming the section 350, subdivision (c) motion by minors' counsel was premature and Melissa was denied due process because she was precluded from presenting much of her evidence. HHSA also claims the court improperly based its decision on the girls' wishes and insufficient evidence supports the finding there was no substantial probability of return.

We first note HHSA lacks standing to raise a claim that Melissa was denied procedural due process. Due process rights are personal and HHSA is not aggrieved by the court's order. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 181-183, pp. 237-241.) Neither Melissa nor HHSA explain what evidence was omitted.

Melissa's claim of abuse of discretion is essentially a challenge to the sufficiency of the evidence. On a challenge to a finding there is no substantial probability that the child will be returned to the physical custody of his or her parent and safely maintained in the home by the 18-month review hearing, our review is limited to whether the finding is supported by substantial evidence. We view the record in the light most favorable to the finding and decide if the evidence supporting it is reasonable, credible and of solid value. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

The evidence shows Katie, Kelli and Kristina suffered years of abuse, neglect and violence in Melissa's care and were emotionally traumatized as a result. During the

course of their young lives they have been dependents for nearly four years. They were exhausted with the process and did not view Melissa as a nurturing, supportive parent. Katie, Kelli and Kristina distrusted their mother and did not want to be alone with her. Their therapists agreed visitation should remain supervised.

Social worker Peck testified the girls could not safely be returned at that time and Melissa was emotionally unstable. Peck conceded there was no substantial probability the girls could be returned within the statutory time frame. He recommended continuing the case to be able to provide conjoint therapy to improve Melissa's relationship with her daughters, not as a transition to returning custody to Melissa.

The review hearing was conducted only three months before the 18-month end date. Melissa had only been sober for 11 months. She continued to associate with and rely financially upon a man who had abused her and her daughters. According to the psychologist, Melissa had a longstanding pattern of subjecting herself to physical abuse and self-destructive behavior to stay with a mate. Melissa did not demonstrate she has the capacity and ability to provide for Katie's, Kelli's and Kristina's safety, protection, physical and emotional well-being, and special needs.

The court did not improperly base its decision on the girls' wishes. Kelli qualified as a witness and her testimony was relevant and probative to her emotional state and whether the case should continue. Katie's and Kristina's statements provided by the social worker were also probative. The court was required to consider the girls' wishes along with the other evidence. The social worker conceded there was no substantial probability of returning the girls in the remaining time. The court's conclusion that there

was no substantial probability Katie, Kelli and Kristina would be returned to Melissa's physical custody and safely maintained in her home is supported by substantial evidence.

DISPOSITION

The petition is denied.

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BENKE, Acting P. J.

WE CONCUR:

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HUFFMAN, J.

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O'ROURKE, J.